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IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As we demonstrated in the Petition, the Georgia Court of Appeals defied this Court's prior GVR order by resting its judgment (affirming a $257 million punitive damages award) on a transparently meritless waiver ground and by refusing to conduct the "thorough, independent review" required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). Respondents' brief does not (and cannot) provide a meritorious defense of the court of appeals' decision. This Court should therefore reverse the judgment, summarily or otherwise.

1. The court of appeals used an arbitrary and unprecedented waiver holding in an attempt to insulate from review its unwarranted rejection of petitioners' federal constitutional claims. Respondents' belated defense of the court of appeals' waiver holding is insubstantial.

At the outset, respondents unsuccessfully seek to shore up that holding by suggesting (at 14, 21) that the court of appeals faulted petitioners for failing to include their federal due process claims in their "enumerations of error." The court of appeals' opinion makes clear that it did not rest on any enumerations-related ground: although the court of appeals noted that the relevant enumeration challenged the punitive award as "excessive" (not "grossly excessive"), it "[p]retermitt[ed] whether this adequately enumerated an 'excessiveness' claim under the federal due process clause." Pet. App. 11a. For good reason: the enumeration was more than adequate under state law, *see Felix v. State*, 523 S.E.2d 1 (Ga. 1999), and a State in any event could not hinge the preservation of a federal claim on the inclusion of the word "grossly" in "grossly excessive." *See generally* R. Stern, *et al.*, *Supreme Court Practice* 210-15 (8th ed. 2002).

Respondents are similarly mistaken in arguing (at 14) that petitioners' original court of appeals brief presented their *BMW* claims in only two sentences of argument and one citation of authority. Although that would have been enough,[1] there was much more. Despite a pressing page limit (particularly for a case in which the trial spanned five weeks), petitioners explained in detail why the punitive award violated *state* law. *See* Pet. 13-14; Pet. App. 68a-70a. They then added that, for the same reasons, the award "also violate[d] the Due Process Clauses of the Georgia and United States Constitutions." *Id.* at 70a. Georgia courts cannot thwart federal claims on the strength of a rule requiring senseless repetition: quite apart from the impermissible novelty of such a rule,[2] it does not "serv[e] a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

In response to petitioners' observation that respondents never before argued that petitioners failed to preserve *any* due process claims, respondents resort to desperate tactics. In a brief filed during this case's first visit here, respondents claimed that petitioners' arguments had been "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had *about notice*." Br. in Opp. App. 22a (emphasis added). That statement referred to a specific subset of petitioners' due process claims: namely, their argument that petitioners lacked notice that punitive damages might be imposed

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[1] In none of the cases respondents cite (at 15) did the appellants provide as much legal analysis as petitioners here. Besides, the Georgia Supreme Court has held that, because Rule 27(c)(2) is framed in the disjunctive, either "argument" or "citation of authority" suffices. *See American Cent. Ins. Co. v. Lee*, 548 S.E.2d 338, 341 (Ga. 2001).

[2] *See, e.g., Preston v. Georgia Power Co.*, 489 S.E.2d 573, 575 n.1 (Ga. Ct. App. 1997) (allowing one party to "incorporat[e] by reference" arguments in *another party's* briefs).

where, at the time of their conduct, its illegality was not clearly established (set forth at pages 16-22 of petitioners' first Petition). Respondents (at 19) now attempt to turn that statement into a blanket waiver argument by ellipsing out the italicized words.[3] The attempt is unconvincing.[4]

Respondents are equally mistaken when they minimize the court of appeals' failure to invoke waiver when the case was first before it. According to respondents (at 20), the court of appeals did not find a waiver "*because* Petitioners had not yet raised the issue." But if that had been the court of appeals' reasoning, it would have said so at the time: it expressly found Rule 27 waiver in connection with another issue. *See* Pet. App. 52a n.6. The court's failure to do so with respect to petitioners' federal claims demonstrates that the procedural bar was invented *post hoc*.

Finally, respondents unsuccessfully attempt (at 21 & n.11) to explain away this Court's prior GVR order by arguing that *federal* courts have sometimes found waiver following a GVR from this Court. But, in the instant case,

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[3] Perhaps on the theory that the best defense is a vigorous offense, respondents (at 20) ironically accuse *petitioners* of "[u]sing ellipses to alter the meaning of a quote." The quotation in question — which, incidentally, did not even use ellipses — was entirely accurate. Petitioners quoted a brief in which respondents had argued not that petitioners had failed to preserve *any* due process claims, but only that "the proper presentation of *some* due process claims under *BMW*" could not "adequately preserve separate ones." Br. in Opp. 22a. The quoted brief thus conceded — or, at a minimum, never contested — that at least *some* claims under *BMW* were adequately preserved.

[4] Similarly meritless is respondents' suggestion that they defended the court of appeals' waiver ground in the Georgia Supreme Court. Respondents' brief in that court wrongly attributed to the court of appeals a narrower waiver theory — that petitioners had failed to preserve their request for the *de novo* review required by *Cooper* — and then defended the result on *that* ground. *See* Br. in Opp. 24a-29a.

the preservation issue was extensively briefed in this Court before the GVR issued, raising a strong inference that the Court rejected respondents' waiver arguments. Moreover, as respondents themselves have argued in this Court, *see* Pet. 16; Br. in Opp. 4, preservation is a jurisdictional matter in a case hailing from *state* court. By their own theory, then, the prior GVR in this case implies that petitioners' federal claims were properly preserved.

2. Respondents are also wrong in arguing that the court of appeals correctly applied *BMW*'s guidepost framework. At the outset, respondents miss the mark when they argue (at 19) that the court of appeals, far from criticizing this Court's punitive damages jurisprudence, merely quoted sources as part of a "balanced, scholarly analysis." Only a blindly partisan advocate could mistake the court of appeals' discussion for a "balanced, scholarly analysis." The court of appeals barely concealed its disdain for this Court's punitive damages case law, and refused to apply *Cooper* as a matter of state law. Besides, the court of appeals did not quote anyone when it accused this Court of "br[eaking] with common law tradition" and "avoid[ing] the application of the Seventh Amendment." Pet. App. 7a.[5]

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[5] Respondents likewise miss the point when they argue (at 2-3) that this case is not a dispute between local and out-of-state interests. Time Warner is a New York company, and respondents at trial described it as such. *See, e.g.*, 11/17/98 Tr. 44 ("decisions about the Georgia park" were made "at Rockefeller Center in Manhattan by Time Warner, Inc."). Meanwhile, the limited-partner respondent is a Georgia entity. Moreover, the lawyers who, if victorious here, might pocket hundreds of millions of dollars are members of the Georgia plaintiffs' bar.

Respondents' suggestion (at 2) that petitioners voluntarily selected the Georgia state court venue is also meritless. Petitioners brought a declaratory judgment action because litigation was inevitable: respondents had threatened to sue and had expressly retained a right to

As for the application of *BMW*'s first guidepost, respondents' answer to the central question in this case — what might petitioners have done that was so reprehensible as to warrant a quarter-billion-dollar fine? — is thoroughly underwhelming. Based on the amount of punitive damages involved, one might think that petitioners knowingly sold tainted penicillin that killed defenseless children or perhaps profited from a foreign regime's enslavement of innocent civilians. But respondents do not accuse petitioners of any such conduct. Instead, petitioners' evil is said to consist of this: "At the heart of Petitioners' scheme was a plan to depress 'the value of the park by under-investing in it and then withholding information so that [petitioners] could acquire the park at a discount' once the partnership agreement between Petitioners and Respondents ended in 1997." Br. in Opp. 5 (quoting Pet. App. 33a).

That this is the linchpin of respondents' case is remarkable for two reasons. *First*, even if one accepts respondents' statement at face value, petitioners' conduct is not remotely on a par with the conduct that one might expect judging from the size of the punitive award. No matter how many times respondents repeat it, "a callous indifference to the financial well-being" of respondents — "sophisticated business people" (Pet. App. 12a-13a) who, advised by the finest lawyers and investment bankers, earned more than a 100-fold return on a tax shelter that they themselves structured — is nowhere near the far end of the reprehensibility spectrum.

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do so in the new partnership agreement. Because complete diversity was lacking (the general partner being headquartered in Georgia), petitioners could not have sued in federal court. And it is doubtful that petitioners could have obtained *in personam* jurisdiction over respondents in any State other than Georgia.

Second, the theory that petitioners tried to reduce the park's purchase price by depressing earnings (through insufficient capital investment) cannot be accurate: it does not make logical sense. If indeed petitioners failed to install enough thrill rides in the Georgia park, this would have been plain for the world to see. Accordingly, no rational bidder would have thought that the park's historical earnings expressed the park's true potential, and, thus, no rational bidder would have appraised the park's value on the basis of the twelve-times-last-year's-earnings rule of thumb. *See* Pet. 20 & n.15. The proof of the pudding is in the eating: respondents cannot explain how a $9 million investment could add $150 million to the park's value overnight.[6] Thus, the theory is simply irrational; petitioners might as well have been punished for practicing witchcraft.

Assuming that petitioners in fact invested less than they should have, their conduct was motivated not by some devilishly clever scheme to acquire the park at a discount but by a simple attempt at self-protection. Under the agreement, respondents would gain title to all park property at the end of the partnership term in 1997. This encouraged respondents to make increasingly greedy demands for capital investment as the end of the term crept closer. Understandably, petitioners were reluctant to meet demands for major investment in new rides that would become the property of respondents only one or two years later.[7] Whatever one might think about that reluctance, the ultimate in reprehensibility it is not.

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[6] The closest respondents come to an explanation is by saying (at 7) that their damages multiplier theory was "explained repeatedly at trial, through several expert witnesses." But illogic does not change into logic when it is intoned by a paid "expert."

[7] Respondents correctly point out (at 5-6 n.4) that the funds that petitioners were supposedly required to invest would have come not

Respondents' other assertions of reprehensible conduct add nothing. Contrary to respondents' suggestions (at 26-27 n.16) and the court of appeals' misapprehensions (Pet. App. 13a, 24a), petitioners did not *steal* anything. Respondents received their full share of the so-called Coca-Cola money — it was merely the timing of the transfer to which they objected.[8] Likewise, the $4 million in overhead allocated from Six Flags' national headquarters and the $1.4 million in supposed overcharges for the Viper ride involved accounting and valuation issues as to which reasonable persons could plainly differ. *See* 12/7/98 Tr. 95-110, 122-35.

Respondents' brief also distorts the record where it portrays (at 22) petitioners as admitting that they were subject to a legal "duty to maximize the performance" of the park. Respondents base their argument on the testimony of an executive who, in response to the question whether "you and others at Time Warner realized and acknowledged that you had a duty to maximize the financial performance of the partnership parks," stated: "I always recognize that you have, you should maximize the return of a partnership park or any park." 11/17/98 Tr. 246. The witness thus testified only to a belief that it is

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directly out of petitioners' own pockets but, rather, out of the park's retained earnings. Be that as it may, under the partnership agreement, petitioners received 70% of any additional retained earnings, and respondents only 30%. Thus, funds invested in rides would otherwise disproportionately have wound up in petitioners' pockets. Indeed, if this were otherwise, it is hard to see how respondents could logically accuse petitioners of acting out of greed.

[8] Coca-Cola paid petitioners $20 million for a ten-year nationwide sponsorship arrangement, but the payment was contingent on the seven Six Flags parks' meeting attendance targets. As those targets were being met, the Georgia park received its 1/7 share of the $2 million annual amount, or about $285,000 per year. *See* 12/7/98 Tr. 135-39.

generally good business practice to maximize profits — not that the partnership agreement authorized a jury to substitute its views for petitioners' business judgments.

In connection with *BMW*'s second guidepost, respondents suggest (at 24) that, because petitioners have paid the compensatory award, this Court must accept that award as a realistic measure of the harm inflicted. They are wrong: "[t]he ratio should not be determined by measuring the punitive damages award against the unproved compensatory damages awarded by the same 'runaway' jury that rendered the punitive damages verdict but against the actual damages proven by the evidence." *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting), *petition for cert. filed*, 71 U.S.L.W. 3519 (Jan. 21, 2003) (No. 02-1096); *see also Cooper*, 532 U.S. at 442 ("unrealistic" compensatory damages cannot support punitive award).

As for *BMW*'s third guidepost, respondents hardly even address the court of appeals' most glaring error: its reliance on statutes punishing conduct (like state RICO and securities fraud) vastly dissimilar to petitioners' — on the theory that those statutes likewise addressed "generally corrupt corporate behavior." Pet. App. 15a. That holding destroys *BMW*'s third guidepost as a meaningful restraint. *See* Pet. 21. Yet, in its defense, respondents argue (at 26 n.16) that "Petitioners' argument . . . would turn this Court into an arbiter of what is 'comparable' under state law." But this Court has already held that, if this is a concern at all, it "does not justify an abdication of [its] responsibility to enforce constitutional protections in an extraordinary case such as this one." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586 n.41 (1996).

The Petition also showed (at 23-24) that the court of appeals independently erred when, because Georgia has no

statutes carrying quarter-billion-dollar fines, it conducted its third-guidepost inquiry by reference to statutes threatening not fixed amounts but treble damages. Respondents answer (at 24-25) by wrongly suggesting that courts do so *routinely*. Although the error of the court below admittedly is not unprecedented, *see* Pet. 23 n.20, the decisions respondents cite (at 25) — to the extent they are even good law[9] — appear to have relied on treble damages statutes only for purposes of *BMW*'s *second* guidepost (as *BMW* did itself, *see* 517 U.S. at 580). Respondents are also wrong in saying (at 26-27) that, "if treble damages statutes did not provide constitutionally sufficient notice of liability up to three times the actual damages, then all treble damages statutes would be unconstitutional." Even assuming that awards under statutes allowing for treble damages are subject to *de novo BMW* review (*but see Cooper*, 532 U.S. at 440 n.13), our argument implies only that the inquiry under the third *BMW* guidepost should direct itself to statutes threatening penalties in fixed amount.[10]

The Petition further showed (at 24-25) that the court of appeals erred when, in conflict with other courts, it refused to make a comparison to punitive awards in other cases. Respondents (at 28 & n.18) now raise their assault on *BMW*'s third guidepost to a fever pitch: they say that "such a review would not have assisted Petitioners" in any event because "[t]he Georgia Courts have repeatedly affirmed

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[9] Although respondents do not identify them as such, one of their citations is to a case antedating *BMW* (*AIC*), one is to a dissent (*St. John*), and one is to a decision that was reversed on appeal (*Pioneer*).

[10] At a minimum, whether respondents are correct in their apparent argument that punitive awards up to three times compensatory damages can *never* offend due process constitutes an important question of federal law that should be settled by this Court.

punitive damages awards in breach of fiduciary duty cases with a much higher ratio to the compensatory award than the 1.3 to 1 ratio here." But the third guidepost deals not in relative ratios but in absolute amounts: it calls for an inquiry into "maximum civil penalt[ies]" to help assess whether "a more modest sanction" would have been "sufficient to motivate full compliance" with the law. *BMW*, 517 U.S. at 584-85. Plainly, a fine much smaller than $257 million would have amply sufficed to deter any possible "future misconduct." *Id.* at 584.

3. Respondents' only answer (at 29) to petitioners' request that the Court hold this case for *State Farm* is that the "focal point" of that case is an extraterritoriality issue that is not presented here. Even if that statement were accurate (which it is not), it would not undermine the need for a hold. A GVR is warranted whenever there is a "reasonable probability" that an intervening decision will provide additional guidance, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) — a standard that is amply satisfied even if application of the *BMW* guideposts turns out not to be *State Farm*'s "focal point."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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